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OCT 28 200

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No. 01-525

IN THE

Supreme Court of the United States

ROOSEVELT EZELL,

Petitioner,

v.

DIRECT LABOR, INC. AND THE GRAY INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

RESPONSDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20 pp

STATEMENT OF PARTIES IN INTEREST

The undersigned counsel of record for Direct Labor, Inc. and The Gray Insurance Company, Respondents, certify the following have an interest in the outcome of this case:

1. Direct Labor, Inc. (Respondent)

2. The Gray Insurance Company (Respondent)

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TABLE OF CONTENTS

STATEMENT OF PARTIES IN INTEREST i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

RESPONDENT'S BRIEF IN OPPOSITON TO PETITION FOR WRIT OF CERTIORARI 1

COUNTERSTATEMENT OF FACTS AND PROCEEDINGS BELOW 2

REASONS FOR WRIT DENIAL 5

I. THE " MARITIME BUT LOCAL" DOCTRINE REQUIRES THE APPLICATION OF THE LOUISIANA WORKERS' COMPENSATION ACT IN THIS MATTER) 5

II. PETITIONER IS NOT ENTITLED TO ASSERT A GENERAL MARITIME LAW CLAIM AGAINST HIS EMPLOYER 9

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Brockington v. Certified Electric, 903 F.2d 1523 (11th Cir. 1990) ..... *passim*

Director, Office of Workers' Compensation Programs, U.S. Department of Labor v. Perini North River Associates, 459 U.S. 297, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983) 6

Green v. Industrial Helicopters, Inc., 593 So.2d 634 (La. 1992), *rehearing denied*, 593 So.2d 634 (La. 1992) 7, 8, 11

Green v. Vermillion Corp., 144 F.3d 332 (5th Cir. 1998), *cert denied*, 526 U.S. 1017, 119 S.Ct. 1251, 143 L.Ed.2d 349 (1999) 5, 11, 12, 13, 14

Herb's Welding, Inc. v. Gray, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985) 6

Hetzel v. Bethlehem Steel Corporation, 50 F.3d 360, (5th Cir. 1995) 7

Randall v. Chevron U.S.A., Inc., 13 F.3d 888 (5th Cir. 1994), *cert. dismissed*, 512 U.S. 1265, 115 S.Ct. 5, 129 L. Ed. 2d 906 (1994) 3

Rodrigue v. Aetna Casualty and Surety Co., 395 So.2d 352, 89 S.Ct. 1835, 23 L. Ed. 2d 360 (1969) 8

Rodrigue v. Legros, 563 So.2d 248, (La. 1990) 9

Spencer Kellogg & Sons, Inc. v. Hicks (The Lindseed King), 285 U.S. 502, 52 S.Ct. 450, 76 L. Ed. 903 (1932) 12, 13

Statutes

33 U.S.C. §905(b) 2, 3

33 U.S.C. §901 11

33 U.S.C. §902(3)(B) 12

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Direct Labor, Inc. and The Gray Insurance Company (referred to collectively hereinafter as "Direct Labor") respectfully oppose the Petition of Roosevelt Ezell for Writ of Certiorari. Petitioner has failed to meet the established considerations governing review on certiorari and has not set forth compelling reasons for this Court to grant the Petition. Specifically, (a) there is no important federal question which was decided in the courts below and which conflicts with decisions of another state court of last resort or of the United States Court of Appeals; and (b) the decision from the court below did not address an important question of law that has not been settled by this Court.

COUNTERSTATEMENT OF FACTS AND PROCEEDINGS BELOW

Petitioner was hired by Direct Labor as a rigger in June, 1994, and worked exclusively in Direct Labor's Houma, Louisiana yard in a position that was unquestionably not maritime related. In August 1994, Petitioner was temporarily assigned to work with a labor crew on a fixed platform in the marsh hear Houma, Louisiana. In order to access the platform, the work crew used a small boat owned by Chet Morrison General Contractors, Inc. (hereinafter referred to as "CMGC"). CMGC instructed Direct Labor's foreman which of CMGC's available vessels to use to transport the Direct Labor crew to the job site. Petitioner's only connection to this vessel was the use of the vessel in a transportation function to and from the job site.

On August 10, 1994, the Direct Labor crew was riding in CMGC's vessel, returning from a job site, when Earl Trahan, the Direct Labor foreman, realized Roger Pitre, also a Direct Labor employee, was about to turn the vessel down a wrong canal. When Trahan advised Pitre of his error, Pitre slowed the boat down and turned the boat down the proper canal. During the turn, Petitioner fell off the water cooler he was sitting on, striking his back on the side of the boat.

As a result of this incident Petitioner filed suit in the 32nd Judicial District Court, Parish of Terrebonne, State of Louisiana against Direct Labor and CMGC, alleging he was entitled to recover under §905(b) of the Longshore & Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33

U.S.C. §905(b). This matter was tried to the District Judge without a jury on November 3, 4, 5, and 6, 1997 and June 18, 1999. It was taken under submission following the completion of trial and on July 7, 1999 the District Judge issued Findings of Facts and Reasons for Judgment, as well as a separate judgment. Appendix "C", beginning at p. 18a.[1] The trial court found that under *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994), *cert. dismissed*, 512 U.S. 1265, 115 S.Ct. 5, 129 L. Ed. 2d 906 (1994), plaintiff was an employee covered under the LHWCA; that Direct Labor was the operator of the vessel in question, that Direct Labor's employee was negligent in operating the vessel; that CMGC should be exonerated from liability;[2] and that plaintiff was not comparatively at fault. The trial court awarded general damages for past, present, future physical pain and suffering, mental anguish and disability, future medical expenses, past lost wages, future lost earnings and earning capacity, and judicial interest and other costs.

Direct Labor and Gray timely filed a Suspensive Appeal and this matter was briefed to the Louisiana Court of Appeal, First Circuit, who, on December 22, 2000, issued its opinion reversing the July 7, 1999 Judgment, holding Petitioner was

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[1] Petitioner has submitted the relevant decisions of the courts below in the Appendix to his Petition for Writ of Certiorari. Respondents adopt the Appendix submitted by Petitioner as the Joint Appendix in this matter, and have no need to submit any further Appdendix.

[2] Petitioner did not appeal the dismissal of the claims against CMGC.

not an employee covered under the LHWCA and that Petitioner's sole remedy is under Louisiana state law. Appendix "B", beginning at p. 8a. Following the decision of the Court of Appeal, Petitioner filed an Application for Rehearing. On March 6, 2001, the Court of Appeal granted rehearing for the limited purpose of providing more in-depth reasoning to clarify its opinion on the "maritime but local" doctrine, but in all other respects reaffirmed its December 22, 2000 opinion holding Petitioner was not a longshoreman and is limited to state law remedies. Appendix "A", beginning at p. 1a.

Thereafter Petitioner filed an Application for Writ of Certiorari or Review with the Louisiana Supreme Court, which was denied on May 25, 2001. Appendix "D", beginning at p. 35a.

REASONS FOR WRIT DENIAL

Direct Labor submits that the decisions of the courts below in this "maritime but local" matter are consistent with the Eleventh Circuit's decision in *Brockington v. Certified Electric*, 903 F.2d 1523 (11th Cir. 1990), and do not conflict with the United States Court of Appeal for the Fifth Circuit's decision in *Green v. Vermillion Corp.*, 144 F.3d 332 (5th Cir. 1998), *cert denied*, 526 U.S. 1017, 119 S.Ct. 1251, 143 L.Ed.2d 349 (1999) (hereinafter referred to as "*Green/Vermillion*"). Therefore Direct Labor respectfully requests the Petition for Writ of Certiorari be denied.

I. THE "MARITIME BUT LOCAL" DOCTRINE REQUIRES THE APPLICATION OF THE LOUISIANA WORKERS' COMPENSATION ACT IN THIS MATTER.

There is no real dispute that admiralty jurisdiction applies to the instant matter. The dispute is whether under the General Maritime Law an individual involved in non-maritime employment who is injured on navigable waters has a tort remedy against his employer for his co-employee's negligence, where there is a state compensation scheme that provides the employee's exclusive remedy is worker's compensation. Respondents contend the General Maritime Law does not afford a cause of action to an employee involved in a non-maritime employment against his employer for his co-employee's negligence.

This Court has on a number of occasions addressed the precise question presented herein, that is, the extent to which state law may provide a workers' compensation remedy in

the maritime context. One of the most succinct statements of the law in this area is found in *Director, Office of Workers' Compensation Programs, U.S. Department of Labor v. Perini North River Associates*, 459 U.S. 297, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983), wherein this Court held:

> If the employment of an injured worker was determined to have "no direct relation" to navigation or commerce, and the operation of local law [would not] materially "affect" the uniformity of maritime law, then the employment would be characterized as "maritime but local", and the state could provide a compensation remedy.

Id., 459 U.S. at 306, 103 S.Ct. at 641.

This Court has repeatedly held that oilfield workers who work on fixed platforms are not engaged in maritime employment. See, *e.g.*, *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424-426, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985). Petitioner has essentially conceded that he was engaged in non-maritime employment. Therefore, his claim arising on navigable waters is "maritime but local". The Louisiana Supreme Court previously addressed the "maritime but local" doctrine in connection with claims by employees on fixed platforms where the claim arises on navigable waters:

> An offshore worker's employment activities have "no direct concern" with maritime shipping or commerce. The U.S. Supreme Court has stated that work related to oil and gas exploration is not "maritime employment." Therefore, the tangential relationship of offshore drilling to traditional mari-

> time activities along with the strong Louisiana interest in a case of this nature brings this case within the "maritime but local" doctrine.

Green v. Industrial Helicopters, Inc., 593 So.2d 634, 643 (La. 1992), *rehearing denied*, 593 So.2d 634 (La. 1992). (*citations omitted*) (hereinafter "*Green/Industrial*").

The Federal Fifth Circuit has also discussed the "maritime but local" doctrine in connection with workers' compensation claims:

> The Supreme Court next created the so-called maritime but local exception that allowed certain workers, injured on navigable waters to receive state workers' compensation benefits. "If the employment of an injured worker was determined to have no 'direct relation' to navigation or commerce, and the application of local law [would not] materially affect" the uniformity of maritime law, then the employment will be characterized as 'maritime but local', and the state could provide a compensation remedy. If the employment could not be characterized as "maritime but local" then the injured employee would be left without a compensation remedy.

Hetzel v. Bethlehem Steel Corporation, 50 F.3d 360, 364 (5th Cir. 1995) (*citations omitted*).

In the instant matter, the Louisiana Court of Appeal, First Circuit, concluded Petitioner's "employment was not itself particularly maritime in nature nor was its purpose to facili-

tate maritime commerce, as the work he performed involved working on an inland fixed oilfield platform. *See Rodrigue v. Aetna Casualty and Surety Co.*, 395 So.2d 352, 355, 89 S.Ct. 1835, 1837, 23 L. Ed. 2d 360 (1969)." Appendix "B", at p. 16a. Petitioner does not contest this finding, nor does Petitioner contest the Court of Appeal's finding on rehearing that Louisiana's "interest in applying its workers' compensation law far outweighed the federal interests found." Appendix "A", at p. 5a. Petitioner is a Louisiana citizen, Direct Labor was a Louisiana corporation, Petitioner's employment was totally within Louisiana and, Direct Labor contends, as noted in *Green/Industrial*, the parties herein "more likely than not, expect it to be governed by Louisiana law." *Green/Industrial*, 593 So.2d at 638. Therefore, just as in *Green/Industrial*, "Louisiana has a strong interest in applying its own law in this case," *Id.*, and Louisiana Workers' Compensation Act should provide Petitioner's remedy herein.

Direct Labor submits that given the strong Louisiana interest and the social policy embodied in the Louisiana Workers' Compensation Act, Louisiana law should be applied in this matter. Louisiana law should be respected unless there is some federal impediment to application of that law contained in federal legislation or a clearly applicable rule in the General Maritime Law. *Id.* As there is no federal legislation or applicable general maritime rule, there is no impediment to the application of Louisiana law.

Finally, as admiralty uniformity concerns generally involve legislation of maritime shipping and commerce, see *Id.*, at 641, and not "tort cases due to the fortuitous nature of

accidental injuries and the strong state interest in providing redress for injuries," *Rodrigue v. Legros*, 563 So.2d 248, 254 (La. 1990), application of Louisiana law in this matter does not adversely affect admiralty uniformity.

Direct Labor submits that the "maritime but local" doctrine repeatedly set forth by this Court governs the instant matter, as Petitioner's employment had no direct relation to navigation or commerce and the application of Louisiana law does not materially affect the uniformity of maritime law. Louisiana's interests far outweigh any federal interest in this matter. Petitioner herein was only fortuitously on navigable waters at the time of the incident. For these reasons Direct Labor submits the "maritime but local" doctrine requires the application of Louisiana law to Petitioner's claims in this matter.

II. PETITIONER IS NOT ENTITLED TO ASSERT A GENERAL MARITIME LAW CLAIM AGAINST HIS EMPLOYER.

This "maritime but local" matter is governed by Louisiana law and Petitioner's sole remedy against his employer Direct Labor is under the Louisiana Workers' Compensation Act. Petitioner is not entitled to assert a General Maritime Law negligence claim against his employer.

This matter is precisely on point with the Eleventh Circuit's decision in *Brockington v. Certified Electric*, 903 F.2d 1523 (11th Cir. 1990). In *Brockington*, the plaintiff, a land-based electrician, was riding in a vessel, not owned by his employer, but operated by his co-employee, *Id.* at 1525, when he was injured when the vessel crossed over the wake

of another vessel and he fell from his seat and was injured. *Id.* at 1526. *Brockington* filed suit against his employer under the LHWCA and the General Maritime Law. The Eleventh Circuit found that a land-based electrician was not engaged in maritime employment and thus could not satisfy both the situs and status requirements under the LHWCA. *Id.*, at 1528. The Eleventh Circuit went on to hold that although there was admiralty jurisdiction for the claim, the plaintiff could not assert a negligence claim against his employer in violation of the exclusivity provision of the Georgia Workers' Compensation Act. *Id.*, at 1533. The *Brockington* court reviewed the considerations in favor of application of state law, and found that the state has an "interest in being permitted to regulate independently matters of local concern without interference by the federal government, ...and in having state-created rights and obligations protected and enforced in actions in federal court." *Id.*, internal citations omitted. The *Brockington* court then reviewed a number of cases, some of which applied the federal rule, while others applied the state court rule, and ultimately concluded:

> Having considered the competing interest surrounding the present action, the court finds that the state has a strong interest in application of its worker's compensation law with no comparable interest to tip the balance in favor of application of General Maritime Law.

Id. at 1533.[3]

Respondents submit that Petitioner herein, like the plaintiff in *Brockington*, does not have a sufficient connection to maritime commerce to warrant application of maritime law in this "maritime but local" matter. Just as in *Brockington*, Petitioner was not involved in maritime employment at the time of his accident, was simply a passenger in a vessel owned by a party other than his employer, and was allegedly injured due to the negligence of a co-employee.

Petitioner argues incorrectly that this matter should be governed by *Green/Vermillion*. Direct Labor contends that not only did *Green/Vermillion* not create a broad new remedy available to this Petitioner, but also that it is clearly factually distinguishable from the instant matter.

Plaintiff's argument notwithstanding, *Green/Vermillion* did not create a broad new remedy, rather it created a very limited remedy for a non-fatally injured employee of a hunting club who was injured while unloading a vessel owned by the club. Even though the employee was engaged in a traditional maritime employment on navigable waters at the time he was injured, thus satisfying both the situs and status requirements for coverage under the LHWCA, 33 U.S.C. §901, *et seq.*, the Fifth Circuit held the employee was excluded from coverage under the club/camp exclusion to the

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[3] As stated above the Louisiana Supreme Court also held that Louisiana has a "strong" state interest in the area of oilfield activities which are non-maritime. *See Green/Industrial*, 593 So.2d at 643.

LHWCA, 33 U.S.C. §902(3)(B). *Green/Vermillion*, 144 F.3d at 335. The Fifth Circuit went on to hold that the employee, as a maritime worker not covered by the LHWCA, was entitled to assert an unseaworthiness claim and a General Maritime Law negligence claim against his employer. *Id.*, at 337; 341-2. Nowhere, however, in *Green/Vermillion* did the Fifth Circuit announce a broad, new remedy for all employees not covered by the LHWCA who are injured on navigable waters. *Green/Vermillion* is limited to employees engaged in maritime employment who are injured on navigable waters while performing traditional maritime work, thus satisfying both situs and status requirements, but who are not otherwise covered by the LHWCA by virtue of a specific exclusion in the act. Petitioner does not fit into this class of employees as he was not engaged in maritime employment at the time of the incident.

Further, the case before this Court is clearly factually distinguishable from *Green/Vermillion*. Unlike Green, Petitioner was not involved in traditional maritime employment and was not injured while onboard a vessel owned by his employer. The key facts upon which the Fifth Circuit relied to fashion a remedy in *Green/Vermillion* are simply not present in the instant case.

These same factual considerations distinguish the instant matter from *Spencer Kellogg & Sons, Inc. v. Hicks (The Lindseed King)*, 285 U.S. 502, 52 S.Ct. 450, 76 L. Ed. 903 (1932). In *The Lindseed King* the employer had the "dual relationship of a carrier by water and general employer," *Id.*, 285 U.S. at 514 52 S.Ct. at 454 and that was the basis for permitting an employee to maintain a tort action against his

employer. *The Lindseed King* employer was the owner of a 45' gasoline launch that was used on a daily basis to transport its employees across the Hudson River. *Id.* 285 U.S. at 505, 52 S.Ct. at 451. *The Lindseed King* employer owned a vessel that was involved in the interstate carriage of passengers, who were both employees and non-employees. *Id.* 285 U.S. at 508, 511, 52 S.Ct. at 451-52. This Court relied on three facts to permit the tort claim: that the employer was also the vessel owner; that the vessel was used daily to transport the employees to work; and that the vessel was being operated in interstate commerce. None of these factors are present in the instant case. The vessel was owned by CMGC, not Direct Labor. CMGC told the Direct Labor foreman which of CMGC's available vessels to use to transport the Direct Labor crew to the job site, Direct Labor did not use the vessel daily to transport its employees to work, interstate commerce was not implicated by transporting the crew from Bayou Black marina to Bayou Penchant and back. Thus, Direct Labor did not have the "dual relationship of a carrier by water and general employer" which would give rise to a tort claim by its employees.

Direct Labor contends that Petitioner's sole remedy against his employer is a claim under the Louisiana Workers' Compensation Act. None of the factual considerations which allowed a tort claim in *Green/Vermillion* or *The Lindseed King* are present in this case. Rather, this matter is factually identical to *Brockington*, where the non-maritime employee, who was injured while riding in a vessel not owned by his employer as a result of his co-employee's negligence, was limited to a workers' compensation claim.

CONCLUSION

Direct Labor submits that this matter is governed by the "maritime but local" doctrine. Petitioner was involved in non-maritime employment at the time he was injured while on navigable waters. His employment had no direct concern with maritime shipping or commerce and Louisiana has a strong public interest in having its workers' compensation law apply to claims such as this. Further, this matter is factually identical to *Brockington v. Certified Electric*, 903 F.2d 1523 (11th Cir. 1990) where the Eleventh Circuit held that an employee injured on navigable waters while riding in a vessel not owned by his employer could not sue his employer under the General Maritime Law, but was restricted to workers' compensation benefits. Finally, this matter is not governed by *Green v. Vermillion Corp.*, 144 F.3d 332 (5th Cir. 1998), *cert. denied*, 526 U.S. 1017, 119 S.Ct. 1251, 143 L. Ed. 2d 349 (1999) which provided a General Maritime Law remedy to a maritime employee who was precluded from coverage under the Longshore & Harbor Workers' Compensation Act by a specific exclusion in that act.

For these reasons Direct Labor, Inc. and The Gray Insurance Company respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted.

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